Whatever may be the wisdom of the rule that a man without property who makes no reasonable effort to work and pay the sum directed in an order for alimony cannot be punished for contempt, upon strict legal reasoning, the court may under such circumstances punish for contempt; and it has been so held.[7] Upon consideration of the fact that contempt proceedings are within the wise discretion of the court, it would seem that, on principle, the court should have the right to punish one for contempt for not working and paying the alimony as decreed.

In the recent decision of *Fowler* v. *Fowler* (Okla.), 161 Pac. 227, the court, after an examination of both reason and authority, held that an able-bodied man who made no bona fide effort to secure employment in order to pay alimony awarded against him, even though he had no property, may be punished for contempt.

WHEN A DEED ABSOLUTE ON ITS FACE WILL BE CONSTRUED TO BE A MORTGAGE.—Under the old common law, when land was conveyed as security for a debt, unless the debtor complied strictly with the terms of the instrument of conveyance, title to the whole property vested immediately in the creditor upon default. On account of the severity of the case on the generally oppressed debtor, equity gradually assumed jurisdiction and gave the debtor additional time after the forfeiture within which to redeem his estate. This right, known as the equity of redemption, is the characteristic feature of mortgages.[1] The equity of redemption is not lost until the mortgagee forecloses the mortgage in a proper proceeding in equity, and even then only a sufficient sum is taken from the proceeds of the sale to satisfy the debt, the surplus going back to the mortgagor.[2]

Many attempts have been made by creditors to defeat the equity of redemption incident to a transfer of property as security for a debt by making the transaction in form a conditional sale or even an absolute conveyance. But no matter what the form of the transaction may be, if it is in essence a mortgage, equity will so hold.[3] A mortgage is always for the security of some obligation, and hence, if the conveyance is intended to secure an existing debt, it is necessarily a mortgage.[4] But the law does not prohibit condi-

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[7] Lester *v.* Lester, *supra;* Staples *v.* Staples, 89 Wis. 592, 58 N. W. 1036, 24 L. R. A. 433. See Muse *v.* Muse, 84 N. C. 35.

[1] See POWELL, MORTGAGES, p. 108; 2 TIFFANY, REAL PROP., § 506.

[2] See BISPHAM, EQ., pp. 200, 204.

[3] Russell *v.* Southard, 12 How. 139. See 3 POMEROY, EQ. JUR., 3 ed., § 1192.

[4] Enos *v.* Sutherland, 11 Mich. 538. See Wilcox *v.* Morris, 1 Murphy (N. C.) 116, 3 Am. Dec. 678, where the court said, "It may be laid down as a general rule, subject to few exceptions, that wherever a conveyance or an assignment of an estate is originally intended as a security for money, whether this intention appear from the deed itself or any other

tional sales, and where it is clear that one was intended the law will enforce it; for the intention of the parties is the paramount consideration.[5] In cases where it is doubtful whether the transaction is a conditional sale or a mortgage, the test almost universally applied is whether the transaction wipes out the debtor's liability on the debt, or whether the debt still exists and the debtor is still liable personally on it.[6] Though this test is simple enough in its terms, it is usually difficult to determine whether or not the debtor is still liable in fact on the debt, and whether or not the conveyance was intended merely as security for the debt. To determine this all the facts of each particular case must be considered.

In the absence of conclusive evidence on the point, there are certain other marks characteristic of mortgages, which, though not conclusive, raise the presumption that the debt still exists, and hence that the transaction is in essence a mortgage. If the supposed purchase price is grossly inadequate, equity regards this as almost conclusive evidence of a mortgage.[7] The fact that the grantor continues in possession of the property is indicative of a mortgage rather than of a sale.[8] If the grantor pays interest on the indebtedness with the purpose of preserving the right to redeem the property transferred, this is evidence that the debt has not been liquidated.[9] But if the original evidences of the debt have been cancelled, this is strong proof of a conditional sale.[10] And it has been held that a court of equity will not assist a mortgagor to redeem land after forfeiture, if he has knowingly permitted an innocent purchaser to buy the land from the mortgagee, and to place permanent improvements thereon.[11]

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instrument, it is always considered in equity as a mortgage and the estate redeemable, even though there be an express agreement of the parties that it shall not be redeemable, or that the right of redemption shall be confined to a particular time or to a partcular description of persons."

[5] Conway *v.* Alexander, 7 Cranch 218. In Tuggles *v.* Berkeley, 101 Va. 83, the court said, "It is true that both forms of sale are conditional, but the vital distinction between them is this: the equity of redemption is an inseparable incident of a mortgage, so much so that it can not be defeated, restrained, evaded or in any other way impaired, even by agreement of parties, as long as the mortgage continues a security, though the mortgagee may become a purchaser of the equity of redemption, and thus combine the legal and equitable estates in his own person. Courts of equity, however, scrutinize transactions of this character with the utmost care, and ever stand ready to set them aside, and grant relief to the debtor whenever a gross inadequacy of price or any circumstances of oppression or mistake appear.

"On the other hand, in the case of a conditional sale, the non-performance of the condition renders it absolute, both at law and in equity."

[6] Budd *v.* Van Orden, 33 N. J. Eq. 143; Voss *v.* Eller, 109 Ind. 260, 10 N. E. 74; Holladay *v.* Willis, 101 Va. 274; 3 POMEROY, EQ. JUR., § 1195.

[7] Turnipseed *v.* Cunningham, 16 Ala. 501, 50 Am. Dec. 190; Tuggles *v.* Berkeley, *supra;* Russell *v.* Southard, *supra.*

[8] Tuggles *v.* Berkeley, *supra;* Turnipseed *v.* Cunningham, *supra.*

[9] Murphy *v.* Calley, 1 Allen (Mass.) 107; Montgomery *v.* Spect, 55 Cal. 352; De Carrion *v.* De Aguayo, 133 Cal. 29, 65 Pac. 618.

[10] Fisher *v.* Green, 142 Ill. 80, 31 N. E. 172.

[11] Tufts *v.* Tabley, 129 Mass. 380.

In the late case of *Shaner* v. *Rathbone State Bank* (Idaho), 161 Pac. 90, the plaintiff executed a mortgage to the defendant to secure an unpaid note. Later the plaintiff deeded the mortgaged property to the defendant, and the defendant cancelled the note. The plaintiff was given the right to repurchase within one year; but, failing to do this, he filed a bill to have the deed declared a mortgage. The court held that the transaction was a conditional sale. This holding seems to be sound; for the transfer was in payment of the debt, and hence nothing was left for the mortgage to secure.

At law a debtor will not be permitted to prove by parol evidence that a deed, absolute on its face, is a mortgage.[12] But a defeasance in a separate instrument may be construed with the deed as a part of the same instrument and the transaction held to be a mortgage, if the defeasance is executed at the same time as the deed, and is also under seal.[13] In equity, however, parol evidence is admissible to determine the true character of the transaction—not only where there is a parol contract of defeasance,[14] but even where there is none.[15] And equity goes much further; for it will, in direct opposition to the terms of the instrument, declare an instrument in form a deed to be a mortgage, if it appears that a mortgage was really intended.[16] But where the transaction is on its face an absolute conveyance, clear and convincing proof is necessary to rebut the presumption that an instrument is what it appears to be;[17] though all doubts will be resolved in favor of it being a mortgage.[18]

The ground for admitting parol evidence in violation of the parol

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[12] Reading *v.* Weston, 8 Conn. 117, 20 Am. Dec. 97; Flint *v.* Sheldon, 13 Mass. 443. In many states this is regulated by statute. In Illinois parol evidence is admissible at law by statute. German Ins. Co. *v.* Gibe, 162 Ill. 251, 44 N. E. 490. But in Pennsylvania parol evidence at law is prohibited by statute. Sankey *v.* Hawley, 118 Pa. St. 30, 13 Atl. 208.

[13] Bunker *v.* Barrom, 79 Me. 62, 1 Am. St. Rep. 282; Lund *v.* Lund, 1 N. H. 39, 8 Am. Dec. 29; Kelleran *v.* Brown, 4 Mass. 443; Warren *v.* Lovis, 53 Me. 463.

[14] Jackson *v.* Lawrence, 117 U. S. 679.

[15] State Bank *v.* Matthews, 45 Neb. 659, 50 Am. St. Rep. 565; Campbell *v.* Dearborn, 109 Mass. 130, 12 Am. Rep. 671.

[16] Russell *v.* Southard, *supra.* The court said, "The conclusion at which we have arrived on this part of the case is, that the transaction was, in substance, a loan of money upon the security of the farm, and being so, a court of equity is bound to look through the forms in which the contrivance of the lender has enveloped it, and declare the conveyance of the land to be a mortgage."

[17] Coyle *v.* Davis, 116 U. S. 108; Hudkins *v.* Crim, 72 W. Va. 418, 78 S. E. 1043.

[18] In Matthews *v.* Sheehan, 69 N. Y. 585, the court said, "In all doubtful cases a contract will be construed to be a mortgage rather than a conditional sale, because in the case of a mortgage the mortgagor, although he has not strictly complied with the terms of the mortgage, still has his right of redemption; while in the case of a conditional sale, without strict compliance, the rights of the conditional purchaser are forfeited." Turnipseed *v.* Cunningham, *supra.*

evidence rule is that equity is never bound by rules of evidence if a fraud would be perpetrated thereby. Mr. Pomeroy says, "The principle which underlies this doctrine is the fruitful source of many other equitable rules; that it would be a virtual fraud for the grantee to insist upon the deed as an absolute conveyance of the title, which had been intentionally given to him, and which he had knowingly accepted, merely as security, and therefore in reality as a mortgage." [19]

[19] 3 POMEROY, EQ. JUR., 3 ed., § 1196.